

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**6309828 CANADA, INC., DBA
TRANSPORT INTER-EXPRESS,**

Respondent.

**Docket No. FMCSA-2007-28268¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On February 23, 2007, the Federal Motor Carrier Safety Administration (FMCSA) Vermont Division Administrator served a Notice of Claim (NOC) on 6309828 Canada, Inc., dba Transport Inter-Express (Respondent). The NOC, based on a January 31, 2007, compliance review, charged Respondent with two violations of 49 CFR 382.301(a), using a driver before the motor carrier has received a negative pre-employment controlled substance test result. The NOC proposed a civil penalty of \$2,480 for the violations.

After Respondent failed to respond to the NOC, the Field Administrator for FMCSA's Eastern Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on April 3, 2007. The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective April 9, 2007, with the civil penalty immediately due and payable on that date.

¹ The prior case number was VT-2007-0017-US0766.

On April 17, 2007, Respondent served a Petition for Reconsideration.

Respondent attached copies of the NOC and NDFAO and stated that it did not agree with the violations cited in the NOC. However, it subsequently apologized for the violations, indicating it misunderstood the 30-day exception to the pre-employment controlled substances testing requirement.² Respondent requested that no civil penalty be imposed because it was threatened with bankruptcy. Claimant did not respond to the petition.

2. Decision

Respondent defaulted because it did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a). Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has failed to meet this burden. Because it did not explain why it failed to timely reply to the NOC, there is no basis for concluding that its neglect was excusable. Moreover, Respondent did not present a meritorious defense to the violations alleged in the NOC because it essentially admitted the violations.

Prior to revision of the Agency's rules of practice, effective November 14, 2005, the Agency held that if the motor carrier fails to reply to a Notice of Claim in a timely fashion and thereby defaults, it may not petition separately for reconsideration of the civil

² Under 49 CFR 382.301(b), an employer is not required to administer a pre-employment controlled substances test if the driver has participated in a qualified controlled substances testing program within the previous 30 days and meets certain other testing requirements.

penalty amount.³ Although the revised rules provide the Assistant Administrator with the discretion to vacate defaults under the excusable neglect, meritorious defense and due diligence standards set forth in 49 CFR 386.64(b), they were not intended to change the pre-existing prohibition against petitioning separately for reconsideration of the civil penalty amount in the event of a carrier default. In discussing § 386.64(b) in the preamble to the revised rules of practice, the Agency indicated that it wanted to limit the grounds for vacating defaults to “relieve the parties, as well as the decisionmaker, of the burden of addressing other issues in these petitions for reconsideration.”⁴

We construe the term “meritorious defense” in § 386.64(b) as not applying to requests to reduce a proposed civil penalty where the respondent does not contest the substantive violations. In such cases, the respondent is admitting that it committed the violations and has no meritorious defenses. Requesting a waiver or reduction in the proposed civil penalty under these circumstances raises precisely the type of issue the rules were intended to exclude from consideration in a petition for reconsideration challenging a Final Agency Order pursuant to § 386.64(b). To the extent this conclusion is inconsistent with the discussion of challenges to civil penalties in *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration (October 8, 2008), that aspect of the *Wells & Wells* decision is

³ *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions for Reconsideration (March 15, 2002), at 3.

⁴ 70 FR 28477 (May 18, 2005).

overruled.⁵

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Although Respondent arguably acted with due diligence by filing its Petition for Reconsideration within two weeks after receiving the NDFAO, it would be an empty exercise or futile gesture to vacate the Final Agency Order if Respondent is unable to demonstrate a meritorious defense.⁶

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor carrier or driver to participate in the proceedings when required to do so.⁷ Having failed to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.⁸

The Petition for Reconsideration is denied. The Notice of Claim is the Final

⁵ In *Wells & Wells*, the respondent did not submit a meritorious defense to the charges in the NOC, but alleged that payment of the proposed civil penalty would put it out of business. It was concluded that this allegation satisfied the meritorious defense prong with regard to the payment of the civil penalty.

⁶ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration (October 8, 2008), at 5.

⁷ *In the Matter of Parcel Shipper's Express, Inc.*, Docket No. FMCSA-2000-9523, Order, May 25, 2001, at 3.

⁸ *In the Matter of Kent Ness dba Ness Harvesting*, *supra*.

Agency Order in this proceeding.⁹

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5/5/05
Date

⁹ The April 3, 2007, NDFAO stated that the \$2,480 civil penalty was due and payable on April 9, 2007, the date that the NOC would become the Final Agency Order. Because Respondent did not petition for reconsideration until after April 9, 2007, the clock on the effective date of the Final Agency Order was not stayed by the petition. Therefore, the civil penalty is due and payable immediately. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 16 day of May, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Frederic Roux, President
Transport Inter-Express
537 Des Agaries
Rimouski, QC G5N 1M7, Canada

One Copy
U.S. Mail

Anthony G. Lardieri, Esq.
Trial Attorney
Office of Chief Counsel (MC-CCE)
Federal Motor Carrier Safety Administration
802 Cromwell Park Drive, Suite N
Glen Burnie, MD 21061

One Copy
U.S. Mail

Robert W. Miller
Field Administrator
Federal Motor Carrier Safety Administration
802 Cromwell Park Drive, Suite N
Glen Burnie, MD 21061

One Copy
U.S. Mail

Ture A. Nelson
Vermont Division Administrator
Federal Motor Carrier Safety Administration
P.O. Box 338
Montpelier, VT 05601

One Copy
U.S. Mail

Docket Operations
U.S. Department of Transportation
1200 New Jersey Avenue SE
Room W12-140
Washington, DC 20590

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